(30)

No. 03-6696

In The

Supreme Court of the United States

YASER ESAM HAMDI and
ESAM FOUAD HAMDI, as
Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD,
Secretary of Defense, et al.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICUS CURIAE* CHARLES B. GITTINGS JR. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

May it please this Honorable Court, now comes Charles B. Gittings Jr., *pro se*, who appears as *amicus curiae* under Rule 37.3(a) by written consent of both parties.[1]

My interest here is that of a U.S. citizen who is deeply concerned about the issues in this case and has no financial or personal stake in it. When the President issued the "Military Order" of 11/13/2001,[2] I resolved to oppose it in the belief the order was illegal, irresponsible, and dangerous. Since then I have worked full-time on the issues of that order (including the legal cases of Hamdi and the other detainees) for over two years.

The only purpose of my effort is to uphold the laws of the United States. I have made a diligent effort to understand both the facts and the law of this case, and have read and understand the rules of the court.

SUMMARY OF ARGUMENT

This brief will show that the Geneva Conventions are binding on the United States, and that the ruling of the court below that the treaties were, in essence,

[1] Counsel for both parties have granted written consent to this brief and filed copies with the Clerk. No counsel for a party in this case authored this brief in whole or in part. All costs of this brief were paid by *amicus* at his own expense.

[2] Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 F.R. 57833 (Nov. 16, 2001).

unenforceable because they are not "self-executing," was incorrect. The contention here is that the conventions are in fact self-executing and that the reasoning of the court below was unsound, but that even if they were correct about the conventions not being "self-executing," there is other law which explicitly executes the conventions as law for the United States.

Having established that the Geneva Conventions are in force, the brief then turns to their requirements, shows that Hamdi has been denied the protection of his rights in violation of the law, and concludes that the opinion below should be reversed and the case remanded to the district level for a full review of Hamdi's rights.

ARGUMENT

1. General Principles

In advance of the brief, *amicus* stands FOR *habeas* as a natural and universal right; FOR the primacy of our laws and our Congress with respect to military affairs; and FOR the principles of the U.N. Universal Declaration of Human Rights. Those matters have been ably addressed by a distinguished and admirable array of *amici* in this and related cases, and will not be addressed here except where they bear directly.

This brief stands FOR the Geneva Conventions of August 12, 1949, and asserts, *contra* the opinion of the court below, that they have full force in the laws of the United States. (Geneva Conventions I-IV (1949), hereinafter "Geneva" collectively; see TOA for citations. The third convention, hereinafter "GPW," protects POWs; the fourth,

hereinafter "GC," protects civilians. The first two protect wounded and medical personnel over and above the basic protections of GPW and GC and are not relevant here. The first three articles of each convention are identical and are known as Common Articles 1-3, hereinafter CA1-3. There are 190 nations party to Geneva.)

2. The Fourth Circuit *contra* Geneva

In the proceedings below, Hamdi asserted that his detention was unlawful because he had been denied POW status and a fair hearing on the question of his status in violation of GPW arts. 4 and 5. The court below rejected that claim:

> "This argument falters also because [GPW] is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). [GPW] evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations." *Hamdi v. Rumsfeld (III)*, 316 F.3d 450 (4th Cir. 2003), 480-481.

That ruling is incorrect on a number of grounds. First, as other *amici* and authorities have shown, Geneva is in fact either self-executing or effectively so;[3] and while not

[3] See for example: Brief of *Amici Curiae* Former Prisoners of War, *et al.*, in Support of Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696, On

(Continued on following page)

binding as precedent for the Fourth Circuit, *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fl. 1992), was a case of national import that gives a well-reasoned analysis on that point, *Id.* at 797-799. Second, the true intent of Geneva is plainly expressed by CA1, which requires all parties "to respect and to ensure respect for [Geneva] in all circumstances." Third, CA3 applies Geneva to any "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," and it cannot be supposed that diplomatic enforcement was anticipated in a non-international conflict. Fourth, Geneva requires all parties to enforce the conventions by both administrative and judicial means: GPW art. 129 and GC art. 146 require each party to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach'] of [Geneva]," to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts," and to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."

Clearly, the primary means of enforcement envisioned by Geneva is not diplomacy as the court below would have it, but criminal sanctions imposed by the domestic laws of

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Pet. for *Cert.*, *passim* (12/3/2003); and Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, section III. A. *The Applicability of International Law as Law of the United States*, 44 Harv. Int'l L.J. 503, 514-517 (2003).

' Grave breaches are defined in GPW art. 130 and GC art. 147.

the parties acting under the positive obligation of CA1 to "to respect and to ensure respect for [Geneva] in all circumstances." Just as clearly, the United States stated in no uncertain terms during the invasion of Iraq that it expected Iraqi forces to obey Geneva to the letter, yet here the court below has seen fit to ignore Geneva entirely on the doctrinal ground that it is not "self-executing." *Amicus* believes them mistaken, but even if they were correct on that point, there is other law which renders the question moot and their conclusion incorrect.

3. Execution of Geneva under *Foster v. Neilson*

GPW art. 129 and GC art. 146 require all parties to enforce Geneva, and each occurs in Part IV of the two conventions, entitled "Execution of the Convention." The doctrine on "self-executing" treaties applied by the court below to Geneva derives ultimately from *Foster v. Neilson*, 27 U.S. 253, 314-15 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833), and was established by Chief Justice Marshall, writing for the court:

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the Court." *Id.* at 314.

Hence, if Geneva is not self-executing, the legislature must act to execute it. As shown in the preceding section, the court below appears to have been so eager to deny Hamdi any private right of action that they largely ignored what Geneva actually requires. Considered in terms of what Foster requires, Geneva has only one significant provision requiring legislation, namely the requirement in GPW art. 129 and GC art. 146 that all parties "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach] of [Geneva]." Note the language "any . . . necessary"; in practice, it has long been U.S. policy that no special legislation was required. Be that as it may, having reached the conclusion that Geneva was not "self-executing," the court below failed to ask: what exactly would be needed to execute Geneva, and what if any action has Congress taken in that regard?

Had they asked those questions, the answer was obvious: **18 U.S.C. § 2441**, "*The War Crimes Act of 1996*," H.R. 104-698 (1996), as amended by "*The Expanded War Crimes Act of 1997*," H.R. 105-204 (1997), which clearly executes Geneva in exactly the sense of *Foster*. This statute makes it a federal crime to commit any grave breach of Geneva, any violation of CA3, or any act prohibited by arts. 23, 25, 27 or 28 of the Annex to the Hague Convention IV (1907), Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 1 Bevans 631 (hereinafter, "HR" denotes the annex of regulations, "H.IV" the convention proper). The statute applies to anyone who commits a war crime "whether inside or outside the United States," whenever "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." It

is impossible for the ruling of the court below regarding Geneva to be reconciled with the plain meaning of this statute.

4. Geneva is Law for the United States

By the light of *Foster* and 18 U.S.C. § 2441 there can be no doubt that Geneva is the law of the United States. The United States is obligated to "respect and ensure respect for [Geneva] in all circumstances," CA1, and to prosecute any grave breach of Geneva, GPW art. 129, GC art. 146.

Further, there is no form of immunity for war crimes. GPW art. 131 and GC art. 148 state: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches]." The (London) Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945) (hereinafter "IMT"), which governed the Nuremberg trials, also speaks here: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility," IMT art. 7, and "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility," IMT art. 8. In regard to this principle, Justice Robert Jackson made some illuminating remarks in the preface to his report on the conference that negotiated the IMT:

> "The most serious disagreement, and one on which the United States declined to recede from its position even if it meant the failure of the Conference, concerned the definition of crimes.

> The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all."[5]

Geneva is our law by the direct exercise of fundamental constitutional powers by the Congress and President: Geneva was signed under Truman (1949), ratified with the advice and consent of the Senate by Eisenhower (1955), and explicitly executed (1996) and reinforced (1997) by acts of Congress under Clinton. Geneva may be "denounced" only by notification to the Swiss Confederation one year in advance, after which Geneva remains in force until the cessation of hostilities, including the repatriation of all prisoners, GPW art. 142, GC art. 158.

Geneva and Hague specifically codify the laws and customs of war, H.IV preamble, GPW art. 135, GC 154. The Constitution delegates the command of our armed forces to the President, but reserves to Congress the power to create, equip, and regulate such forces. U.S. Const., art. I, § 8, cl. 10-16, 18, U.S. Const., art. II, § 2, cl. 1. The

[5] Report of Robert H. Jackson, *International Conference on Military Trials: London, 1945*, Department of State Publication 3080, U.S. Govt. Print. Off., Washington, D.C. (1949), preface.

President "shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, and the conduct of military operations by the U.S. has been governed by statute from the beginning.[6]

5. The Detention of Yaser Hamdi Violates 18 U.S.C. § 2441

Amicus does not dispute the government's authority to detain a suspected criminal or an enemy in war time, but all such detentions must conform to the law. As the parties and *amici* in this and other detainee cases have shown, the detention of Hamdi fails to comply with GPW arts. 4-5, *etc.*, and is therefore in violation of 10 U.S.C. § 897 and 18 U.S.C. § 4001.

Grave breaches of GPW are defined by GPW art. 130 and include: "wilfully causing great suffering or serious injury to body or health, * * * or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." Grave breaches of GC are defined by GC art. 147 and include: "wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, * * * or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention * * *."

If Hamdi is a combatant as alleged by the government, then depriving him of a fair hearing on the question

[6] See Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Law., November 2003, at 1, 2.

of POW status is a grave breach of GPW; if he is a civilian, his detention, deportation, and deprivation of due process are grave breaches of GC.[7] In either case, it appears that his detention, in conditions which are harsh even by the standards of a maximum security prison, inflicts great suffering.[8] Grave breaches of Geneva are violations of 18 U.S.C. § 2441(c)(1).

Any violation of CA3 is prohibited by 18 U.S.C. § 2441(c)(3), which includes: "cruel treatment," CA3(a), "humiliating and degrading treatment," CA3(c), and "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," CA3(d). The parties and other *amici* explore these particulars at great length. The point here is that detention and legal process in an armed conflict must conform to Geneva, and serious violations are war crimes punishable under 18 U.S.C. § 2441.

Finally, 18 U.S.C. § 2441(c)(2) defines as a war crime any conduct prohibited by arts. 23, 25, 27, or 28 of HR. Regarding due process, HR art. 23 states in significant part: "In addition to the prohibitions provided by special Conventions, it is especially forbidden ... [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." The court below went to extreme lengths to deny Hamdi

[7] See Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, Army Law., November 2003, at 18, 21-29.

[8] See Paust, *supra*, 530-531.

any meaningful protection of his rights, and unless he has absolutely no rights at all, their decisions were not merely incorrect, they were violations of 18 U.S.C. § 2441.[9]

CONCLUSION

There is nothing appropriate about evading or violating the law, nor anything necessary in abusing a prisoner who is *hors de combat*. There is nothing new here: the value of intelligence and the infliction of atrocities on ones enemies are as old as war itself. The President might plausibly suppose there was some advantage to be had by roasting a few of these "detainees" alive over an open fire, thinking it might lead others to cooperate – such "time-honored" practices are as common in history as wars are. Would the Fourth Circuit defer to that as well? And if not, why not? Are we to understand that some of our laws are better than others, and our judges and elected officials are at liberty to choose which to obey according to their personal sensibilities?

The government has gone to great lengths to avoid any accountability to the law here, and all their arguments reduce to a single theme: that in a war the President may do whatever he pleases as long as the Congress is willing to go along with him. But the Congress is not the Roman Senate, the President is not a Roman *Imperator*, and it is precisely this sort of arbitrary and absolute exercise of power unrestrained by the rule of law that our

[9] See also Wallach, *supra*, 42-47.

Constitution, our laws, and the Geneva Conventions are intended to prohibit and prevent.

The Geneva Conventions ARE the law of war, and they ARE the law of the United States. Their only purpose is to protect both combatants and civilians in order to ameliorate suffering in war. No just resolution of this or any other detainee case is possible without strictly observing the requirements of the Geneva Conventions and 18 U.S.C. § 2441. The decision of the court below should be reversed and the case of Yaser Hamdi remanded to the U.S. District Court for Eastern Virginia for a thorough and searching review of his rights.

Respectfully submitted,

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In memoriam
Elias T. "Lile" Jacks (1924-1973)

Revision Notes – This brief was filed February 23, 2004, by GITTINGS, *pro se*, whereupon the Office of the Clerk declined to docket the brief without a member of the Bar of the Court appearing as Counsel of Record per Rule 9. Their reasons remain unclear, but the matter was resolved on March 18, 2004, when MR. REHKOPF notified the Clerk and parties that absent objections, he was willing to appear as Counsel of Record *pro bono publico*, the Court approving. Labels were then submitted to modify the cover and last page of each copy of the brief to reflect the change.

This PDF has the original text with the information for Mr. Rehkopf added. I am very grateful for his generous and timely assistance.

Charles B. Gittings Jr.
March 30, 2004